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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BARRY LAMAR BONDS, Defendant.	Case No. CR 07 0732 SI **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE FOUR: RE OPINION TESTIMONY AS TO THE TRUTH OR FALSITY OF DEFENDANT'S GRAND JURY TESTIMONY OR HIS STATE OF MIND** Date: March 1, 2011 Time: 1:30 p.m. Courtroom of the Honorable Susan Illston

INTRODUCTION

Defendant Bonds is charged with making four knowingly false statements to the grand jury, and with obstructing the grand jury by making those and other statements. All of those statements concern whether Mr. Bonds received and used performance enhancing drugs from

Greg Anderson.

In its Opposition to the "Novitzky" motion, the government correctly asserts that: "Materiality is an element of all five charges the defendant faces at trial." (Opp., at 2). The law defines materiality as a logical connection between the object of a grand jury investigation and the answer to a question put to a grand jury witness. (*See* Opp. at 6, quoting *United States v. McKenna*, 327 F.3d 830, 838 (9th Cir. 2003) ("'[A] statement is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed.'").)

The pleadings of the parties have established that the government will gain admission of a wealth of evidence on the materiality issue. The grand jury transcript establishes that Mr. Bonds was informed that the grand jury was investigating whether Greg Anderson, Bonds's trainer, and Victor Conte distributed illegal substances to athletes. *See* Grand Jury Transcript at 3-4. At trial the government can introduce the Anderson and Conte indictment, which contains the allegation that: "[D]efendant Greg Anderson ... was a personal trainer in the Burlingame area who purchased performance-enhancing drugs from BALCO and distributed them to professional athletes...." The defense has agreed that the government can introduce at trial the plea agreement of Anderson, in which he admitted that he distributed performance enhancing drugs to athletes.

It would insult the intelligence of this district's jury pool to suggest that this evidence will be insufficient to permit the trier of fact to fairly assess whether questions and answers concerning Anderson's distribution of PED's to Mr. Bonds logically related to the grand jury's investigation of Anderson's distribution of PED's to athletes. Nonetheless, the government claims that Agent Novitzky must be permitted to testify on the issue of the materiality of the statements that form the basis of the charges against Mr. Bonds. But as its Opposition makes clear, the government's professed interest in Novitsky's testifying on materiality is largely a sham. If proving materiality were the government's real objective, it would seek only to introduce Novitzky's testimony that, given the nature of the questions put to Mr. Bonds concerning Mr. Anderson and PEDs, any answer given by Mr. Bonds, true or false, had the capability of influencing the grand jury's investigation of PEDs. That testimony would be an

exercise in hauling coals to Newcastle.

The true objectives of the government's proffer are twofold — one stated, the other unstated but obvious. The first is to gain admission of Novitzky's testimony that in his opinion the grand jury testimony of Mr. Bonds was "untruthful." (Opp., at 4, *see also id*., at 5: Novitsky will testify that "he made particular investigative decisions based on his view that the defendant's grand jury testimony was not truthful;" *id*.: testimony will "reveal[] Agent Novitsky's views on whether the defendant was truthful in his grand jury testimony;" *id*., at 9: Novitsky will testify to his "subjective determination of the falsity of the defendant's statements."). The second objective is to subvert this Court's exclusionary order concerning certain evidence gathered by Novitzky and the rest of the prosecution team during the course of the Balco investigation. The government intends to have Novitzky testify to his "view that certain of the defendant's grand jury statements were 'inconsistent' with other evidence...." (Opp., at 5), and claims that such testimony is admissible because "Novitsky was the main instrument for the collection of contradictory evidence." (Opp., at 7). Under the guise of "explain[ing] his thoughts" (*id*.), the government will attempt to have Novitzky testify to hearsay that has already been ruled inadmissible by this Court on the issue of materiality (and all other issues). Absent appropriate bridling by the Court, Agent Novitzky will trigger a mistrial of this action.

I. ANY TESTIMONY BY AGENT NOVITZKY ON THE ISSUE OF MATERIALITY WILL BE FAR MORE PREJUDICIAL THAN PROBATIVE, AND THUS INADMISSIBLE UNDER RULE 403

The government cites to *United States v. Matsumaru*, 244 F.3d 1092, 1102 (9th Cir. 2001), a case with which Mr. Bonds has no quarrel. *Matsumaru* involved charges of visa fraud, and the government called two witnesses to explain why certain statements on a visa application were material to a governmental decision to grant a visa. The questions and answers dealt with the ceding over of certain corporate interests and the management of several condominium units. It certainly would not be obvious to lay jurors why such technical matters might influence a decision on a visa application. Neither witness in *Matsumaru* in any way suggested a view of whether the answers at issue on the visa application were true or false. The testimony of the two witnesses was highly germane, and it was not challenged at trial or on appeal as being either

irrelevant or more prejudicial than probative. The Ninth Circuit rejected a foundational challenge to the evidence under Rule 701, and noted that the defense could have called its own witnesses to testify to contrary conclusions. *Id.* at 1102. (*See also* Opp., at 3, citing *United States v. Safa*, 484 F.3d 818, 821-22 (6th Cir. 2007) (permitting prosecutor to ask Assistant United States Attorney witness whether defendant's answers, if false, would have influenced, impeded, or dissuaded grand jury's investigation, and if true, would have assisted grand jury's investigation.))

Unlike in *Matsumaru*, where Rule 403 was not in issue, the government in this case will place into the record extensive evidence other than that of Novitzky supporting the proposition that questions concerning whether Anderson supplied PEDs to Mr. Bonds, a famous athlete, were logically relevant to an investigation of whether Anderson supplied PEDs to athletes. While testimony by Mr. Novitzky that the questions and answers were material might in the abstract have probative value under *Matsumaru* and *Safa*, it is utterly unnecessary in this case, and, given the mischief the prosecution is bent on creating with Novitzky, his testimony on materiality should be excluded under Rule 403.

II. IRRESPECTIVE OF WHETHER NOVITZKY TESTIFIES THAT CHARGED QUESTIONS AND ANSWERS WERE MATERIAL, HE MAY NOT TESTIFY TO HIS VIEWS ON THE TRUTHFULNESS OF MR. BONDS'S TESTIMONY OR ITS "INCONSISTENCY" WITH OTHER EVIDENCE

The government cannot claim that Agent Novitzky's opinion that he believed defendant Bonds testified falsely before the grand jury is admissible on the central issue in this case — i.e., whether that testimony was in fact knowingly false. Any such contention would be risible in the light of controlling authority. "Under the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form." *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979); *see also Maurer v. Department of Corrections*, 32 F.3d 1286, 1289 (8th Cir. 1994) ("[I]t is hornbook law that opinion testimony as to the credibility of a particular statement is inadmissible and invades the jury's exclusive province of determining the credibility and weight of any evidence."). And indeed the government concedes that a witness may not "testify about the credibility of another witness,

whether by giving an opinion on the truthfulness of the witness's trial testimony or in some extra-judicial interview, because it is the jury's 'responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience.'" Opp., at 6, citing *United States v. Butler*, 769 F.2d 595, 602 (9th Cir. 1985).

Remarkably, despite that concession, the government maintains that "Agent Novitzky may testify [as to] his belief that the defendant's testimony that he did not knowingly receive steroids in exchange for promoting Balco products was false...," on the theory that such testimony will serve as a predicate for further testimony on the "other investigative avenues" developed by Novitzky in response to the Bonds's testimony, and that this evidence, in turn, would serve as proof of materiality. If the government's argument were to be accepted, this Court would be in the position of permitting Novitzky to opine that Mr. Bonds testified falsely, only to turn around and charge the jury that the same opinion testimony could not be considered on the very issue of whether Mr. Bonds testified falsely. That ludicrous scenario will be unnecessary, because the government's argument for admissibility is riddled with illogic.

The elements of falsity of a statement and its materiality to a grand jury's decision are separate and independent of one another. If a question put by the grand jury concerns the object of its investigation, the answer to that question is material, regardless of whether that answer is true or false, because a truthful answer can assist the grand jury and a false answer can impede it. *Safa*, 484 F.3d at 821-22 . For that reason, evidence on the issue of materiality has no necessary or logical connection to the issue of truth or falsity. Were Novitzky to be permitted to give any testimony on materiality, that testimony logically should not address the truth or falsity of Mr. Bonds' testimony, and is prohibited from doing so by the relevant case law. *United States v. Henke*, 222 F.3d 633, 643 (9th Cir. 2000) (per curiam) (holding that lay testimony about whether other witnesses were telling the truth is prohibited); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (upholding exclusion of expert psychiatric testimony that a witness was a sociopath who would lie, because "[c]redibility...is for the jury — the jury is the lie detector in the courtroom.")

The government appears to believe that Agent Novitzky's "thoughts," and his "*subjective*

determination of the falsity of the defendant's statements" are relevant to the materiality inquiry. (Emphasis added). But materiality does not concern the subjective opinion of an investigator regarding the statements of a grand jury witness or his reactions to that testimony. (Opp., at 7: "Agent Novitzky, after learning of the defendant's grand jury testimony, was the main instrument for the collection of contradictory evidence.") Rather, the materiality inquiry involves an objective assessment of whether a statement, true or false, had a "natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed" — i.e., the grand jury. *McKenna*, 327 F.3d at 838.

As to authority cited by the government, in *United States v. Ahmed*, 472 F.3d 427, 433-34 (6th Cir. 2006) (Opp., at 4-5), the defendant on appeal raised a foundational challenge under Rule 701 to trial testimony concerning materiality, but no appellate claim that (1) the testimony violated the ban on witness testimony concerning the credibility of a defendant's statement, or (2) its probative value of the evidence was outweighed by its prejudicial effect. An appellate opinion cannot stand for a proposition that it does not discuss, and *Ahmed* discusses nothing relevant to the objections raised by Mr. Bonds as to Novitzky's testimony.

The government's citation to the *Thomas* case (*United States v. Thomas*, 612 F.3d 1107 (9th Cir. 2010)) and its supplying of transcripts from that case border on the silly. For reasons of tactics or ignorance on the part of defense counsel, there was no objection to Novitzky's materiality testimony at trial in *Thomas*, and, as the government concedes (Opp., at 4, n.1), no discussion whatsoever of the admissibility of that testimony in the Ninth Circuit opinion.

The only relevance of *Thomas* to the present matter is the fact that Novitzky used the subject of materiality as an opportunity to discuss drug testing results and their inconsistency with Thomas's grand jury testimony. (Exhibit B to Opp., at pages 8-9) That may not have been particularly prejudicial in the *Thomas* matter, because the test results were in evidence. But acceptance of the government's contention that "Agent Novitzky's view that certain of the defendant's grand jury statements were 'inconsistent' with other evidence is admissible" (Opp., at 5) will assuredly lead to Novitsky's shoe horning into his "materiality" testimony his "view" of the very test results and hearsay statements that this Court has already ruled inadmissible.

There are two additional reasons opinion testimony by Novitzky on truth or falsity must be excluded under Rule 403. The petit jury's decision on that crucial issue must be based only on the evidence at trial that is admitted on that specific issue. Novizky's opinions are not based on all of that evidence, because he will not have heard or considered the defense evidence. On the other hand, his opinions will be based on inadmissible hearsay evidence which may not be considered by the jury in deciding guilt and innocence. No set of instructions could inoculate the jury against the prejudicial impact of that conundrum. Finally, were Novitzky to testify to his opinion as to the truthfulness of Mr. Bonds's grand jury testimony or the "inconsistency" of that testimony with other evidence, the defense would be entitled to call its own witnesses to testify to the precise contrary. *Matsumaru*, 244 F.3d at 1102. All such testimony should be excluded under Rule 403.

III. THE GOVERNMENT SHOULD BE PROHIBITED FROM OFFERING ANY LAY OPINION TESTIMONY AS TO DEFENDANT'S KNOWLEDGE

In *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000) (per curiam), the Ninth Circuit overturned a conviction in which Judge Walker had permitted testimony that a defendant "must have known" about a false reporting scheme, which was essential to prove that the defendant made a knowingly false statement. *Id.* at 639-41. As the Court explained, under Federal Rule of Evidence 701, a lay witness's opinion is admissible only when it is helpful to understanding the witness's testimony or to the determination of a fact in issue. Thus, "[i]f the jury already has all the information upon which the witness's opinion is based, the opinion is not admissible." *Id.* at 641.

The government concedes that *Henke* is good law, but claims that it may offer testimony on the defendant's knowledge that is "fundamentally different than the lay testimony opinion that was at issue in *Henke*, 222 F.3d at 641." (Opp., at 9.) The government's pleading does not specify the content of that testimony or the specific witnesses who would offer it. Because lay testimony as to the defendant's knowledge is presumptively inadmissible under *Henke*, the government should be ordered to refrain from attempting to introduce such testimony unless it first has tendered it to the defense and the Court outside the presence of the jury.

CONCLUSION

The government must be barred from introducing inadmissible opinion testimony on the truth or falsity of Mr. Bonds' statements or the state of his knowledge.

Dated: February 24, 2011

Respectfully submitted,

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